

The statutory prohibition of market manipulation in Zimbabwe¹

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Abstract

Market manipulation includes, inter alia, a practice that interferes or attempts to interfere with the free and fair operation of the securities and financial markets by creating an artificial, false or misleading appearance of the price of, or market for, the relevant securities, commodities or financial instruments. Consequently, market manipulation is treated as an offence in many countries, including Zimbabwe. For instance, market manipulation is expressly prohibited under the Securities Act 17 of 2004 (Chapter 24: 25) as amended (Securities Act 2004). In light of this and for the purposes of this article, the adequacy of the statutory prohibition on market manipulation in Zimbabwe will be examined. Accordingly, selected key elements, types, examples, penalties and definitional aspects of the market manipulation offence under the Securities Act 2004 are discussed. This is done to unpack and examine the adequacy of the Securities Act 2004 in relation to the combating of market manipulation in the Zimbabwean financial markets. It is hoped that the recommendations enumerated in this article will enable policy makers to develop optimal regulatory measures that promote investor protection and effectively combat market manipulation in the Zimbabwean financial markets.

Keywords: market manipulation, financial markets, offences, penalties.

JEL Classification: K22, K23

1. Introduction

Market manipulation is a sub-type of market abuse and it, *inter alia*, includes a practice that interferes or attempts to interfere with the free and fair operation of the securities and financial markets by creating an artificial, false or misleading appearance of the price of, or market for the relevant securities, commodities or financial instruments.⁴ Consequently, market manipulation is treated as an offence in many countries, including Zimbabwe. For instance, market manipulation is expressly prohibited under the Securities Act.⁵ In light of this and

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⁴ Chitimira, 2015, *PER Journal*, pp. 112-113.

⁵ 17 of 2004 (Chapter 24: 25) as amended (Securities Act 2004), see ss 96-99 read with ss 100-118; Chitimira 2015 *PER Journal* 112-148.

for the purposes of this article, the adequacy of the Zimbabwean statutory prohibition on market manipulation will be examined. Accordingly, selected key elements, types, examples, penalties and definitional aspects of the market manipulation offence under the Securities Act 2004 are discussed. This is done to unpack and examine the adequacy of the Securities Act 2004 in relation to the combating of market manipulation in the Zimbabwean financial markets. It is submitted that financial markets must consistently reflect the genuine prices and value of the securities and financial instruments.⁶ Thus, the Zimbabwean financial markets must be free from market manipulation to enable them to promote and truly reflect the natural forces of supply and demand for the relevant securities and financial instruments.⁷ Robust enforcement of the anti-money laundering laws could curb market manipulation, market rigging and other illicit activities in the Zimbabwean financial markets.⁸ This could also enable the Zimbabwean financial markets to promote market integrity, investor protection and public investor confidence.⁹

The provisions of the Securities Amendment Act¹⁰ that were enacted to, *inter alia*, enhance the effectiveness of the Securities Exchange Commission of Zimbabwe (SECZ) and extend its powers to increase investor protection are also discussed.¹¹ This is done to explore the flaws in the current Zimbabwean anti-market manipulation statutory regulatory framework. In this regard, possible measures that could be utilised to enhance the combating of market manipulation in Zimbabwe are provided. The adequate regulation and enforcement of market manipulation laws will give rise to fair and efficient financial markets. Accordingly, it is hoped that the recommendations enumerated in this article will enable policy makers to develop optimal regulatory measures that promote investor protection and reduce systematic risk by effectively combating market manipulation in the Zimbabwean financial markets.¹²

2. The definitional aspects

2.1 The definition of market abuse

Like the approach in South Africa,¹³ Namibia, Australia, the United States of America (USA), the United Kingdom (UK)¹⁴ and many others, the term “market

⁶ Latimer, 1999, *Asia Pacific Law Review*, pp. 247-251.

⁷ *Ibid*, pp. 247-251.

⁸ Malaysian Securities Commission, *Securities Commission Annual Report, 1997*, 160; Davis *Professional Investor Rules* 10-216.

⁹ Davis, *Professional Investor Rules*, pp. 10-216; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 24-25.

¹⁰ 2 of 2013 (Amendment Act), see s 22.

¹¹ Nhavira, Mudzonga and Mugocho, 2013 *Zimbabwe Economic Policy Analysis and Research Unit*, pp. 1-73.

¹² *Ibid*; Fisher et al, *The Law of Investor Protection*, p. 278-736, for related discussion.

¹³ Ss 78; 80; 81 & 82 of the Financial Markets Act 19 of 2012 (Financial Markets Act); see related comments by Chitimira, 2014 *Obiter*, pp. 254-271.

abuse” is not expressly defined in the Securities Act 2004.¹⁵ Moreover, there is no express definition of market abuse under the Amendment Act¹⁶ in Zimbabwe. Accordingly, practices that could amount to market abuse offences are merely enumerated in the Securities Act 2004.¹⁷ Accordingly, practices that could give rise to trade-based market manipulation and disclosure-based market manipulation of any listed securities and/or financial instruments are outlined and prohibited under the Securities Act 2004.¹⁸ In this regard, it must be noted that market abuse generally refers to both insider trading and market manipulation.¹⁹

2.2 The definition of market manipulation

The term “market manipulation” is not expressly defined under the Securities Act 2004.²⁰ Despite this, market manipulation practices are prohibited under the Securities Act 2004.²¹ For instance, practices that could give rise to disclosure-based market manipulation and trade-based market manipulation are statutorily prohibited under the Securities Act 2004.²² However, as indicated in the introduction, there is no satisfactory definition for market manipulation in Zimbabwe and many other countries. Accordingly, as indicated earlier, market manipulation may be defined as a conduct that interferes or attempts to interfere with the free and fair operation of the securities and financial markets by creating an artificial, false or misleading appearance of the price of, or market for the relevant securities, commodities or financial instruments that are listed on regulated financial markets.²³ Although this definition applies to trade-based market manipulation²⁴ and the disclosure-based market manipulation,²⁵ it does not expressly provide for Internet-based market manipulation and other market

¹⁴ Notably, the relevant market abuse legislation in these countries and jurisdictions do not statutorily define the concept of “market abuse”. See related discussion by Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 24-25.

¹⁵ See ss 96-99 read with ss 100-118.

¹⁶ See ss 3-38; see further Fischel and Ross, 1991 *Harvard Law Review*, p. 503 at 506 & Avgouleas E., *The Mechanics and Regulation of Market Abuse*, p. 104.

¹⁷ Ss 96-99 read with ss 100-118.

¹⁸ Ss 96-99 read with ss 100-118.

¹⁹ Chitimira, 2014, *Obiter*, pp. 254-271.

²⁰ There are no specific provisions that expressly define market manipulation under the Securities Act 2004, see ss 96-99 read with ss 2; 87; 100-118; see related discussion by Bhala, Yeh and Bhala, *International Investment Management*, pp. 100-588.

²¹ Ss 96-99 read with ss 2; 87; 100-118 of the Securities Act 2004; see further Bhala, Yeh and Bhala, *International Investment Management*, pp. 100-329.

²² Ss 97 and 96 respectively; see further Harrison and Ryder, *The Law Relating to Financial Crime in the United Kingdom*, pp. 100-200.

²³ Chitimira, 2015, *PER Journal*, p. 112-113; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 36-40.

²⁴ S 96 of the Securities Act 2004; see further Chitimira, 2014, *PER Journal*, pp. 938-965; Harrison and Ryder, *The Law Relating to Financial Crime in the United Kingdom*, p. 143, for further discussion.

²⁵ S 97 of the Securities Act 2004; see further Harrison and Ryder, *The Law Relating to Financial Crime in the United Kingdom*, pp. 100-200.

manipulation practices that could be perpetrated through social media platforms.²⁶ In other words, the Securities Act 2004 does not expressly provide a definition of market manipulation which applies to a broader range of, and/or the various types of market manipulation activities in the Zimbabwean financial markets.²⁷ The Securities Act 2004 does not clearly provide a definition for market manipulation that applies to, and outlaws any practice which abnormally or artificially affects, or is likely to affect, the formation of prices or volumes of securities or financial instruments including dark pools and wash trades.²⁸

3. Examples and types of market manipulation under the Securities Act 2004

3.1 Disclosure-based market manipulation

Disclosure-based market manipulation usually occurs where a person intentionally makes or publishes or disseminates false, incorrect or misleading information relating to certain securities and/or financial instruments while aware that it has the effect of misleading other persons regarding the value, trading volume and/or price of such securities or financial instruments.²⁹ Examples of disclosure-based market manipulation includes pump-priming, publication of false information about a company's securities in order to attract and encourage more trading in such securities as well as pump and dump. Pump and dump allows the offender to take advantage of the artificial demand and supply that is created by the false information to buy or sell his or her own securities and/or financial instruments to the detriment of other market participants that are ignorant of such information. Thus, disclosure-based market manipulation could also occur if a person intentionally disseminates false, misleading, unsubstantiated rumours or incorrect financial projections, financial forecasts, financial evaluations or any false information relating to any securities or financial instruments. Disclosure-based market manipulation is outlawed under the Securities Act 2004.³⁰ Examples of disclosure-based market manipulation under the Securities Act 2004 includes false statements and/or publication of fictitious or artificial transactions relating to the affected securities and financial instruments listed on a regulated exchange.³¹ The Securities Act 2004 defines a regulated exchange as a registered securities exchange or a securities exchange that conducts business lawfully outside Zimbabwe.³² This suggests that the disclosure-based market manipulation

²⁶ Ss 96 & 97 of the Securities Act 2004; see further Bhala, Yeh and Bhala, *International Investments Management*, p. 100-329; Mantysaari, *The Law of Corporate Finance*, pp. 131-582.

²⁷ Chitimira, 2015, *PER Journal*, pp. 113-148; Chitimira, 2014, *Mediterranean Journal of Social Sciences*, p. 61-62; 64 & 67-68; Cassim, 2008, *SA Merc LJ* 34-35 & 60.

²⁸ Ss 96 & 97; see further Cassim, 2008, *SA Merc LJ* 34-35 & 60.

²⁹ Moazeni and Asadollahi, 2013, *European Online Journal of Natural and Social Sciences*, pp. 430-433.

³⁰ S 97; also see Nelemans, 2008, *Valparaiso University Law Review*, pp. 1169-1219.

³¹ S 97; also see Nelemans, 2008, *Valparaiso University Law Review*, pp. 1169-1219.

³² S 87(1).

prohibition under the Securities Act 2004 has extra-territorial application. Moreover, the Securities Act 2004 provides that disclosure-based market manipulation includes the making or publication of any statement, promise or forecast relating to any securities and/or financial instruments by any person that knows that such statement, promise or forecast is false, incorrect or misleading.³³ Any dishonest concealment of material facts in relation to certain securities and/or financial instruments by any person is also treated as disclosure-based market manipulation in terms of the Securities Act 2004.³⁴ Likewise, any reckless and/or dishonest making or publication of a false or misleading statement, promise or forecast that relates to certain listed securities and/or financial instruments by offenders to induce other persons to trade in such securities or financial instruments amounts to disclosure-based market manipulation under the Securities Act 2004.³⁵

Nevertheless, the dissemination of false, misleading, unsubstantiated rumours or incorrect information which gives or is likely to give rise to false or misleading prices, value and trading volumes of securities and financial instruments in regulated exchanges through the media (including social media platforms) and the Internet is not expressly treated as disclosure-based market manipulation under the Securities Act 2004.³⁶ Disclosure-based market manipulation involving false rumours to induce or negatively influence the buying and selling of securities and financial instruments that are not listed on a regulated exchange is not directly covered by the Securities Act 2004.³⁷

3.2 Trade-based market manipulation

Trade-based market manipulation could occur where a person concludes deceptive, fictitious or misleading transactions or activities in relation to certain securities and/or financial instruments in order to negatively influence the buying and selling of such securities and financial instruments.³⁸ Such transactions create fictitious prices or artificial trading volumes of the affected securities and financial instruments in the relevant financial markets. The perpetrators normally conduct trade-based manipulation through actual trading and/or series of illicit transactions that are, *inter alia*, aimed at creating an artificial market, fictitious trading volumes and false prices for certain securities and/or financial instruments to the detriment of ignorant investors. For instance, the investors' trading decisions are negatively influenced by artificial trade transaction volumes and they end up losing their

³³ S 97(1)(a).

³⁴ S 97(1)(b).

³⁵ S 97(1)(c).

³⁶ S 87(1) read with s 97, which does not expressly provide for Internet-based and/or social media-related market manipulation under the Securities Act 2004; see related discussion by Chitimira, 2015, *African Journal of Legal Studies*, pp. 183 & 203; see related discussion by Friedman and Chaffee, *Securities Regulation in Cyberspace*, pp. 100-513; Willemaers, *The EU Issuer-disclosure Regime*, p. 100-300; Mantysaari, *Law of Corporate Finance*, p. 214.

³⁷ S 87(1) read with s 97.

³⁸ Moazeni and Asadollahi, 2013, *European Online Journal of Natural and Social Sciences*, p. 431.

securities and financial instruments to market manipulation offenders.³⁹ Examples of trade-based market manipulation includes entering orders to buy or sell a security listed on a regulated market at higher or lower prices in order to influence the market price of that security and/or financial instrument or transactions that results in no genuine beneficial change in the ownership of the affected financial instruments and/or securities (wash sales); maintaining an artificial price for dealing in listed securities or financial instruments; creating a market corner; painting the tape; quote stuffing, front running and spoofing.⁴⁰

Trade-based market manipulation further include trading orders which gives or are likely to give false or misleading signals regarding the supply and demand for, or price of the affected securities and financial instruments.⁴¹ Likewise, any practice that results in false or misleading appearance of the trading volumes of any securities listed on a registered exchange amounts to trade-based market manipulation under the Securities Act 2004.⁴² Any practice that creates a false or misleading appearance of the market for, or the price of listed securities will give rise to trade-based market manipulation under the Securities Act 2004.⁴³ This suggests that trade-based market manipulation applies to all illicit conduct that affects or give rise to deceptive trading volumes and artificial financial markets for listed securities in Zimbabwe. Moreover, the use of any fictitious or false statement, or artificial transaction and/or device to maintain, inflate, depress or cause fluctuations in the market for, or price of any listed securities by any person amounts to trade-based market manipulation under the Securities Act 2004.⁴⁴ Thus, all transactions that are effected by any person through fictitious devices or any other form of deception or contrivance to negatively influence the prices, trading volumes and market for listed securities are treated as trade-based market manipulation under the Securities Act 2004.⁴⁵ Nonetheless, illicit conduct and practices that could be perpetrated through the Internet and social media platforms and/or that could amount to attempted trade-based market manipulation are not expressly provided for in the Securities Act 2004.⁴⁶

³⁹ *Ibid*, p. 431; Fletcher, 2018, *Duke Law Journal*, pp. 494-554; Lower, 1991, *Yale Journal on Regulation*, pp. 391-402.

⁴⁰ Fletcher, 2018, *Duke Law Journal*, p. 494-554; Lower, 1991, *Yale Journal on Regulation*, pp. 391-402; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 37-39; Mantysaari, *The Law of Corporate Finance*, pp. 131-582.

⁴¹ Chitimira, 2015, *African Journal of Legal Studies*, pp. 191-196; Doyran, *Financial Crisis Management*, pp. 50-260.

⁴² S 96(1)(a); also see Margotta, 2011, *The Business Review*, pp. 14-20; Doyran, *Financial Crisis Management*, p. 50-260; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 37-39.

⁴³ S 96(1)(b); also see Margotta, 2011, *The Business Review*, pp. 14-20; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 37-39.

⁴⁴ S 96(2); see further Margotta, 2011, *The Business Review*, pp. 14-20.

⁴⁵ S 96(2); see further by Chitimira, 2015, *African Journal of Legal Studies*, pp. 191-203; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 37-39.

⁴⁶ S 96.

4. The prohibition of market manipulation under the Securities Act 2004

4.1 Prohibition of trade-based market manipulation

All practices that result in false trading are classified and outlawed as trade-based market manipulation under the Securities Act 2004.⁴⁷ For instance, any practice that culminates in a false or misleading appearance of the trading volumes of any securities listed on a registered exchange is expressly outlawed as trade-based market manipulation under the Securities Act 2004.⁴⁸ This prohibition only applies to illicit transactions that directly or indirectly affects the natural forces of the supply and demand for listed securities in the Zimbabwean financial markets. Put differently, any conduct or practice that interferes with the true trading activity for listed securities amounts to trade-based market manipulation which is prohibited in terms of the Securities Act 2004.⁴⁹ However, it appears that the Securities Act 2004 does not expressly prohibit any illicit trading practices that do not affect the appearance of the trading volumes of listed securities in the Zimbabwean financial markets. Moreover, trade-based market manipulation activities such as transactions with no genuine beneficial change of ownership of the affected securities; maintaining of an artificial price for dealing in listed securities; entering orders to buy or sell securities at, or nearly at the same time for the same price and quantity by colluding parties (matched orders); effecting a market corner and entering orders into the market near the close of the market and/or during the auctioning process or pre-opening session and cancelling such orders immediately prior to the opening of the market to create a deceptive appearance of the market for, or prices of listed securities are not expressly prohibited in the Securities Act 2004.⁵⁰

Any conduct that creates a false or misleading appearance of the market for, or the price of listed securities is expressly prohibited as trade-based market manipulation under the Securities Act 2004.⁵¹ This suggests that illicit trading practices that do not have a direct or indirect effect on the appearance of the market for, or prices of listed securities are not expressly outlawed in the Securities Act 2004.⁵² In addition, any employment of fictitious, artificial or false statements or

⁴⁷ S 96; see further Doyran, *Financial Crisis Management*, pp. 50-260.

⁴⁸ S 96(1)(a); also see Doyran, *Financial Crisis Management*, pp. 50-260; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 37-39.

⁴⁹ S 96(1)(a).

⁵⁰ S 96; see Chitimira, 2014, *Mediterranean Journal of Social Sciences*, pp. 124-134; Yu, *Comparative Corporate Governance in China*, pp. 50-208; Huang, 2009, *Company and Securities Law Journal*, pp. 8-22; Frunza, *Modern Crime in Financial Markets*, p. 111.

⁵¹ S 96(1)(b); also see Margotta, 2011, *The Business Review*, pp. 14-20; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 37-39.

⁵² S 96(1)(b); see related discussion by Yu, *Comparative Corporate Governance in China*, pp. 50-208; Huang, 2009, *Company and Securities Law Journal*, pp. 8-22; Cahn and Donald, *Comparative Company Law*, pp. 100-979; Armson, 2009, <http://www.clta.edu.au/professional/papers/conference2009/ArmsonCLTA09.pdf> (consulted on 1.10.2019), pp. 1-17.

transactions and/or devices to maintain, inflate, depress or cause fluctuations in the market for, or price of any listed securities by any person is outlawed as trade-based market manipulation under the Securities Act 2004.⁵³ Thus, unlawful trading practices that are employed by any person to control, manipulate and/or interfere with the day to day operations of the Zimbabwean financial markets and/or the demand and supply for any securities listed on a regulated exchange are outlawed under the Securities Act 2004.⁵⁴ Nevertheless, the alleged offenders may only incur liability if they intentionally engaged themselves in any trade-based market manipulation practices in relation to listed securities.⁵⁵ Consequently, the offender is obliged to know that he or she was committing a prohibited trading practice in relation to securities listed on a regulated exchange before he or she incurs liability. Moreover, offenders ought to know the effect or possible effect of their conduct before they could incur any liability for trade-based market manipulation under the Securities Act 2004.⁵⁶ The prior requirement of intention and knowledge on the part of the accused persons is difficult to comply with in practice. Therefore, it is possible for the perpetrators of trade-based market manipulation to escape liability if they could prove that they were ignorant of the fact that their conduct was unlawful. The prohibition of trade-based market manipulation under the Securities Act 2004 is also restricted to securities listed on a regulated exchange.⁵⁷ As a result, trade-based market manipulation practices that are perpetrated in unregulated exchanges are not specifically prohibited in the Securities Act 2004.⁵⁸ Accordingly, trade-based market manipulation practices that are perpetrated in other trading platforms such as multilateral trading facilities (MTFs) and organised trading facilities (OTFs) are not expressly prohibited in the Securities Act 2004.⁵⁹ Furthermore, the Securities Act 2004 does not expressly provide whether the term “person” that is employed in its trade-based market manipulation provisions applies to both individuals and juristic persons in respect to the affected listed securities.⁶⁰ If not carefully addressed, this obscurity could encourage unscrupulous individuals to deliberately commit market manipulation offences in the name of

⁵³ S 96(2) read with (3); see further Margotta 2011 *The Business Review* 14-20.

⁵⁴ S 96(2) read with (3); see further Margotta, 2011, *The Business Review*, pp. 14-20.

⁵⁵ S 96(1) & (2) read with (3) of the Securities Act 2004.

⁵⁶ S 96(1) & (2) read with (3) of the Securities Act 2004; Chitimira, 2014, *Obiter*, pp. 254-271; Chitimira and Lawack, 2012, *Obiter*, pp. 548-565.

⁵⁷ S 96 of the Securities Act 2004; Chitimira, 2014, *Obiter*, pp. 254-271; Chitimira and Lawack, 2012, *Obiter*, 548-565.

⁵⁸ Armson, *op. cit.*, 2009, pp. 1-17; Frunza, *Modern Crime in Financial Markets*, pp. 1-270; Beder, *Free Market Missionaries*, pp. 106-270; Barucci and Fontana, *Financial Markets Theory*, pp. 123-763.

⁵⁹ S 96; see further Ferran, 2011, *European Business Organization Law Review*, pp. 380-414; Ferran, 2013, *Journal of Corporate Law Studies*, p. 260-285; Ferran, 2012, *European Company and Financial Law Review*, pp. 3-34 and Ferran, 2012, *European Business Organization Law Review*, pp. 250-270.

⁶⁰ S 96; also see Barucci and Fontana, *Financial Markets Theory*, pp. 123-763.

their juristic persons so as to evade personal liability.⁶¹ Moreover, as earlier stated,⁶² attempted trade-based market manipulation and several other types of trade-based market manipulation as discussed above are not expressly prohibited in the Securities Act 2004.⁶³ The Securities Act 2004's prohibition on trade-based market manipulation does not provide any specific defences for those accused of committing prohibited practices.⁶⁴

4.2 Prohibition of disclosure-based market manipulation

Disclosure-based market manipulation practices such as the making or publication of any statement, promise or forecast relating to any listed securities and/or financial instruments by any person that knows or ought to have known that such statement, promise or forecast is false, incorrect or misleading are expressly prohibited under the Securities Act 2004.⁶⁵ Moreover, fraudulent inducing of any person to deal in securities listed on a Zimbabwean regulated exchange is prohibited in the Securities Act 2004.⁶⁶ Thus, it is an offence to induce or attempt to induce another person to deal in listed securities or financial instruments by making or publishing any statement, promise or forecast that the person knows or ought to have known that it is misleading, false or deceptive.⁶⁷ The dishonest concealment or omission of material facts in relation to listed securities and/or financial instruments by any person is also expressly prohibited under the Securities Act 2004.⁶⁸ The use of the term "material facts" suggests that fault is required to determine whether the concealed fact could give rise to disclosure-based market manipulation under the Securities Act 2004.⁶⁹ Nevertheless, the Securities Act 2004 does not clearly state what amounts to material facts and when exactly (time) such facts could be regarded as material facts for the purposes of disclosure-based market manipulation.⁷⁰ Moreover, the reckless and/or dishonest making or publication of a false or misleading statement, promise or forecast that

⁶¹ S 96 of the Securities Act 2004; see further Ferran, 2012, *European Business Organization Law Review*, pp. 250-270; Barucci and Fontana, *Financial Markets Theory*, pp. 123-763; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 36-39; Piacentini, *Customer Behaviour*, pp. 1-167; Allegranza and Dubrocard, *Internet Econometrics*, pp. 13-335; Mahoney, *Why Securities Regulation Fails*, pp. 50-200; Chitimira, 2014, *Obiter*, pp. 254-271; Vives, *The Impact of Market Microstructure*, pp. 100-400.

⁶² See paragraph 3.2 above.

⁶³ S 96.

⁶⁴ S 96; also see de la Feria and Vogenauer, *Prohibition of Abuse of Law*, pp. 100-550.

⁶⁵ S 97(1)(a); also see Nelemans, 2008, *Valparaiso University Law Review*, pp. 1169-1219.

⁶⁶ *Ibid*, pp. 1169-1219.

⁶⁷ S 97(1)(a) of the Securities Act 2004; see further Ratliff and Grasso, *Insider Trading and Market Manipulation*, pp. 100-575.

⁶⁸ S 97(1)(b); see further Ali and Gregoriou, *Insider Trading*, pp. 3-403.

⁶⁹ S 97(1)(b) of the Securities Act 2004; see related discussion by Chitimira, 2015, *PER Journal*, 112-134; Khademian, *The SEC and Capital Market Regulation*, pp. 84-200.

⁷⁰ S 97(1)(b) of the Securities Act 2004; see Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 39-41; O'Malley, *Bonds Without Borders*, pp. 50-247.

relates to certain listed securities and/or financial instruments by offenders to induce other persons to trade in such securities or financial instruments is outlawed under the Securities Act 2004.⁷¹ Nevertheless, the misleading or deceptive statements, promises or forecasts in respect of the listed securities that relate to the past and/or future performance of public companies are not expressly prohibited under the Securities Act 2004.⁷² This shows that disclosure-based market manipulation in relation to the past and/or future performance of public companies is not expressly prohibited under the Securities Act 2004.⁷³ Moreover, disclosure-based market manipulation involving unconfirmed information and rumours in respect of the securities and financial instruments that are listed and those that are not listed on a regulated exchange is not expressly prohibited under the Securities Act 2004.⁷⁴

The making or publication of false statements in respect of matters that are not directly associated with the companies' past or current performance, but which may nevertheless negatively influence the demand for, or prices of listed securities is not expressly prohibited under the Securities Act 2004.⁷⁵ This flaw could enable companies and their agents to evade liability for their disclosure-based market manipulation in Zimbabwe. Additionally, disclosure-based market manipulation involving social media and Internet-related platforms is not expressly prohibited under the Securities Act 2004.⁷⁶ As a result, unscrupulous persons could commit disclosure-based market manipulation offences in the Zimbabwean financial markets through social media and/or Internet platforms without incurring liability.⁷⁷ Furthermore, the offenders may only incur liability under the Securities Act 2004 if they knowingly commit disclosure-based market manipulation offences.⁷⁸ Another flaw is that the disclosure-based market manipulation provisions contained in the Securities Act 2004 do not apply to financial instruments and/or securities that are not listed on a regulated exchange.⁷⁹

⁷¹ S 97(1)(c); see further Khademian, *The SEC and Capital Market Regulation*, p. 10-200; O'Malley, *Bonds Without Borders*, p. 50-247.

⁷² S 97; see further O'Malley, *Bonds Without Borders*, pp. 50-247.

⁷³ S 97.

⁷⁴ S 97; see related discussion by Ali and Gregoriou, *Insider Trading*, pp. 3-403; Ferran, 2007, *European Company and Financial Law Review*, pp. 463-490; Hall, 2009, *Journal of Financial Regulation and Compliance*, pp. 430-452.

⁷⁵ S 97; see related discussion by Amadou, *Credit Rating Agencies and Rated Markets*, pp. 3-33; Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice* pp. 39-41; Gerster *et al* *European Banking and Financial Services Law*, pp. 69-260.

⁷⁶ S 97; Amadou, *Credit Rating Agencies and Rated Markets*, pp. 3-33.

⁷⁷ This follows the fact that section 97 of the Securities Act 2004 does not expressly provide for the prohibition of social media and/or Internet-based disclosure-based market manipulation in Zimbabwe.

⁷⁸ S 97; see related discussion by O'Brien and Gilligan, *Accountability in Capital Markets*, pp. 40-300.

⁷⁹ See s 97.

5. Available penalties

5.1 Criminal penalties

Market manipulation is treated as a criminal offence under the Securities Act 2004.⁸⁰ For instance, any person that commits trade-based market manipulation will be liable to a fine not exceeding level ten (which is about Zim \$200 0000) or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.⁸¹ On the other hand, any person that commits disclosure-based market manipulation will be liable to a fine not exceeding level seven (which is generally less than Zim \$200 0000) or to imprisonment for a period not exceeding two years or both such fine and imprisonment.⁸² This indicates that there are different criminal penalties for trade-based market manipulation and disclosure-based market manipulation under the Securities Act 2004. It is not clear why the policy makers provided a higher fine and imprisonment sentence for trade-based market manipulation than that of disclosure-based market manipulation. Although a distinction of these criminal penalties could be justifiable, it is submitted that the available criminal penalties for both trade-based market manipulation and disclosure-based market manipulation under the Securities Act 2004 are not deterrent enough for the purposes of combating market manipulation in the Zimbabwean financial markets. This follows the fact that offenders could easily pay off the imposed minimal fines of up to Zim \$200 0000 and continue to enjoy their illicit gains of market manipulation without feeling any pain. Thus, the offenders could easily afford to pay the fine and continue with their illicit market manipulation activities undeterred. Furthermore, offenders could also easily go to jail and serve their two years imprisonment term in case of disclosure-based market manipulation and/or five years' imprisonment term in case of trade-based market manipulation under the Securities Act 2004⁸³ and continue with their market manipulation practices in the Zimbabwean financial markets. Compliance and enforcement of these criminal penalties could also be negatively affected by the fact that the Securities Act 2004 merely stipulates that levels 7 and 10 fines could be imposed on offenders without clearly providing actual amounts of the fines that must be paid by the market manipulation offenders in Zimbabwe.⁸⁴

⁸⁰ Ss 96(3) and 97(2); see related discussion by Van Lancker, *Listed in Belgium 2004*, pp. 19- 219.

⁸¹ S 96(3) of the Securities Act 2004; see related discussion by Chitimira and Lawack, 2012, *Obiter*, pp. 548-565; Lancker, *Listed in Belgium*, 2004, pp. 19-219; Harrison and Ryder, *The Law Relating to Financial Crime in the United Kingdom*, pp. 100-200.

⁸² S 97(2) of the Securities Act 2004; see further Harrison and Ryder, *The Law Relating to Financial Crime in the United Kingdom*, pp. 100-200.

⁸³ Ss 97(2) and 96(3) respectively.

⁸⁴ Ss 96(3) and 97(2) of the Securities Act 2004; see related discussion by Byrnes and Munro, *Money Laundering*, pp. 60-400.

5.2 Civil penalties

Civil penalties are employed to discourage market manipulation practices in Zimbabwe.⁸⁵ For instance, any persons that incur pecuniary loss due to trade-based market manipulation and disclosure-based market manipulation are entitled to recover their losses directly from the perpetrators of such losses in terms of the Securities Act 2004.⁸⁶ Notably, the affected persons may institute civil proceedings to recover their pecuniary losses from any market manipulation offenders even if such offenders are facing criminal proceedings in respect of the same contravention.⁸⁷ The Securities Act 2004 does not clearly stipulate the procedures on how the victims of market manipulation offences may institute civil proceedings against the perpetrators of such offences. However, it appears that the affected persons may only claim and recover their civil remedies from the offenders if they suffered pecuniary losses as a result of the offenders' market manipulation activities.⁸⁸ The term "pecuniary loss" is not defined in the Securities Act 2004. Accordingly, the authors submit that the term "pecuniary loss" could include any monetary loss incurred by the victims of market manipulation in terms of the Securities Act 2004. Nevertheless, it must be noted that the Securities Act 2004 provides that the affected person's pecuniary loss due to market manipulation offences is calculated as the difference between the price at which the person purchased or sold any affected securities and the price at which such securities could have been purchased or sold, had the contravention not occurred.⁸⁹ It is not clear whether the offenders could be sued for the commission and interest costs incurred by the victims of market manipulation. The Securities Act 2004 also provides that the affected person may claim pecuniary loss from the offender for any profit that he or she could have made, had he or she sold the affected securities without the interference and/or inducement from the offender to act otherwise.⁹⁰ It appears the affected persons may only claim their pecuniary loss if they could prove that there was unlawful inducement on the part of the offender.⁹¹ Reference to "greater or smaller loss" in some provisions for civil remedies, for the recovery of the profit gained by the offender suggests that the victims of market manipulation may only claim such remedies if they incurred huge pecuniary losses.⁹²

Any contractual agreements that are concluded by any person to buy or sell securities in contravention of the disclosure-based market manipulation provisions of the Securities Services 2004 in order to induce others to buy or sell such

⁸⁵ S 98 of the Securities Act 2004; see further Byrnes and Munro, *Money Laundering*, pp. 60-400.

⁸⁶ S 98(1) of the Securities Act 2004; see related discussion by Byrnes and Munro, *Money Laundering*, pp. 60-400.

⁸⁷ S 98(2) of the Securities Act 2004; also see Hawk, *International Antitrust Law and Policy*, pp. 200-600.

⁸⁸ S 98 of the Securities Act 2004; see further Hawk, *International Antitrust Law and Policy*, 100-613.

⁸⁹ S 98(3)(a) of the Securities Act 2004.

⁹⁰ S 98(3)(b) of the Securities Act 2004.

⁹¹ S 98(3)(b) of the Securities Act 2004; see further Pearson, *Financial Services Law*, pp. 100-540.

⁹² *Ibid.*

securities amounts to misrepresentation.⁹³ Accordingly, the induced and affected person is entitled to cancel the contract in question if he or she was unaware of the contravention. Notably, apart from incurring liability under the Securities Act 2004, the offender may be sued for the contravention of market manipulation provisions under any other relevant laws.⁹⁴ Nonetheless, the Securities Act 2004 does not provide any measures that could be employed to avoid double jeopardy on the part of the offenders.

In addition, where more than one person has suffered pecuniary loss because of market manipulation, the Securities and Exchange Commission of Zimbabwe (SECZ) may institute a class action against the offenders under the Class Actions Act [Chapter 8:17] 10 of 1999 as amended (Class Actions Act) on behalf of all such persons in order to recover their damages from the offenders.⁹⁵ Apart from the SECZ class actions, the Securities Act 2004 further empowers affected persons to directly institute their own class actions in terms of the Class Actions Act against the market manipulation offenders to recover their damages.⁹⁶

Despite the positive efforts on the part of the relevant authorities as stated above, the Securities Act 2004 does not expressly provide separate and distinct civil penalties that could be imposed on individuals and juristic persons that commits market manipulation in Zimbabwe.⁹⁷ This flaw is worsened by the failure of the Securities Act 2004 to clearly provide factors that could be considered by the courts and/or the SECZ when imposing civil penalties for market manipulation against the offenders to, *inter alia*, avoid possible challenges such as double jeopardy, bureaucracy and delays in the actual payment of the recovered damages to the affected persons.⁹⁸ Accordingly, factors such as the offender's conduct and its adverse effect on the financial markets; whether the penalty is to be imposed on an individual or a juristic person; the amount of profit accrued or loss avoided by the offender and the degree to which the conduct in question was deliberate or reckless should have been provided for in the Securities Act 2004.⁹⁹

5.3 Administrative penalties

The Securities Act 2004 does not expressly provide administrative penalties for market manipulation.¹⁰⁰ Consequently, the SECZ is not statutorily and

⁹³ S 98(4) of the Securities Act 2004.

⁹⁴ S 98(5) of the Securities Act 2004.

⁹⁵ S 99(1) of the Securities Act 2004 read with ss 3-13 of the Class Actions Act; see further El-Dean, *Market-Based Legal System*, pp. 100-280.

⁹⁶ S 99(2) of the Securities Act 2004 read with ss 3-13 of the Class Actions Act.

⁹⁷ S 98 read with s 99 of the Securities Act 2004; see further Johnson and Hazen, *Derivatives Regulation*, pp. 1227-1541.

⁹⁸ S 98 read with ss 96 and 97 of the Securities Act 2004; see further Johnson and Hazen, *Derivatives Regulation*, p. 1227-1541; Chitimira, 2014, *Mediterranean Journal of Social Sciences*, pp. 529-538.

⁹⁹ Chitimira and Lawack, 2012, *Obiter*, 548-565; French, *Blackstone's Statutes on Company Law*, pp. 100-700.

¹⁰⁰ Ss 96-99 of the Securities Act 2004.

expressly empowered to impose administrative penalties against the market manipulation offenders in Zimbabwe. Nevertheless, the SECZ have various administrative powers and authority over licensed persons, committees of registered securities exchanges and central securities depository operators. For instance, the SECZ may issue a warning against a licensed person, committee of a registered securities exchange and/or an operator of a central securities depository that contravenes any condition of their licences, approved schemes or any provision of the Securities Act 2004.¹⁰¹ The SECZ may also require a licensed person, committee of a registered securities exchange and/or an operator of a central securities depository to appoint qualified advisors to enable them to conduct their businesses well.¹⁰² The SECZ may further issue a written instruction to a licensed person, committee of a registered securities exchange and/or an operator of a central securities depository to undertake remedial action in respect of their contravention of the provisions of the Securities Act 2004.¹⁰³ Likewise, the SECZ may impose a monetary penalty not exceeding level five against the offenders for each day that their contravention of the relevant provisions of the Securities Act 2004 has continued.¹⁰⁴ The SECZ may further instruct a licensed person, committee of a registered securities exchange or an operator of a central securities depository to suspend all or some of their employees and businesses in order to ensure compliance with the relevant provisions of the Securities Act 2004.¹⁰⁵

The SECZ may oblige offenders to appoint supervisors to monitor the dealings of a licensed person, committee of a registered securities exchange and/or an operator of a central securities depository and it may further convene meetings to discuss remedial measures so as to ensure compliance with the provisions of the Securities Act 2004.¹⁰⁶ Moreover, has powers to cancel the licence, registration or amend the operating terms of the offending institutions.¹⁰⁷ If the offender is a central securities depository, the SECZ may dissolve it and/or amend the rules governing its operation.¹⁰⁸ The SECZ is obliged to inform the relevant offenders in writing, the action it proposes to take and afford the offenders in question adequate opportunity to make their own representations on the alleged contravention.¹⁰⁹ While these administrative powers on the part of the SECZ are commendable, the SECZ does not have express powers and authority to impose administrative penalties against the market manipulation offenders under the Securities Act 2004.

¹⁰¹ S 105(1)(a) of the Securities Act 2004.

¹⁰² S 105(1)(b) of the Securities Act 2004.

¹⁰³ S 105(1)(c) of the Securities Act 2004.

¹⁰⁴ S 105(1)(d) of the Securities Act 2004.

¹⁰⁵ S 105(1)(e) & (f) of the Securities Act 2004.

¹⁰⁶ S 105(1)(g) & (h) of the Securities Act 2004.

¹⁰⁷ S 105(1)(i) of the Securities Act 2004.

¹⁰⁸ S 105(1)(j) of the Securities Act 2004.

¹⁰⁹ S 105(2) of the Securities Act 2004.

6. Selected flaws of the market manipulation prohibition under the Securities Act 2004

Getting the market participants to comply with the financial markets laws is very difficult to enforce in many countries, including Zimbabwe.¹¹⁰ For instance, the enforcement of the market manipulation prohibition has been problematic in Zimbabwe since 1980 to date.¹¹¹ The failure of the Securities Act 2004 to expressly define the term “market manipulation” has marred the proper enforcement of the market manipulation provisions by the SECZ and the courts in Zimbabwe to date.¹¹² Furthermore, the prohibition on both trade-based market manipulation and disclosure-based market manipulation does not specifically apply to Internet and social media-related market manipulation activities that are carried out in the Zimbabwean financial markets.¹¹³ Thus, the Internet and social media platforms could be providing some unscrupulous persons a much easier and faster conduit for their illicit market manipulation practices in Zimbabwe. The failure of the Securities Act 2004’s anti-market manipulation prohibition to expressly apply to unregulated exchanges is another serious shortcoming affecting the combating of market manipulation practices in the Zimbabwean financial markets.¹¹⁴ The SECZ and the courts have also grappled with the requirement of knowledge and/or proving that the accused persons had the intention to commit the market manipulation offences in question.¹¹⁵

The Securities Act 2004 only provides criminal and civil penalties for market manipulation. However, the available criminal penalties are very little and less dissuasive for deterrence purposes.¹¹⁶ Furthermore, very few civil remedies such as class actions¹¹⁷ and civil pecuniary penalties¹¹⁸ may be employed against the market manipulation offenders under the Securities Act 2004. Over and above, there are no administrative sanctions for market manipulation under the Securities Act 2004.¹¹⁹ This suggests that administrative penalties such as an order for remedial action, costs orders, punitive administrative sanctions and other appropriate disciplinary sanctions are not utilised to combat market manipulation in

¹¹⁰ Ss 96-99 of the Securities Act 2004; Barger, *Financial Institutions*, pp. 38-100.

¹¹¹ *Ibid.*

¹¹² Ss 96-99 read with ss 2; 87; 100-118 of the Securities Act 2004; see related discussion by Bhala, Yeh and Bhala, *International Investment Management*, pp. 100-588.

¹¹³ Ss 96 & 97 of the Securities Act 2004; see further Bhala, Yeh and Bhala, *International Investments Management*, pp. 100-329; Mantysaari, *The Law of Corporate Finance*, pp. 131-582.

¹¹⁴ Armson, *op. cit.*, 2009, pp. 1-17; Frunza, *Modern Crime in Financial Markets*, pp. 1-270; Beder, *Free Market Missionaries*, pp. 106-270; Barucci and Fontana, *Financial Markets Theory*, pp. 123-763; Johnson and Hazen, *Derivatives Regulation*, pp. 1227-1541.

¹¹⁵ Ss 96 & 97 of the Securities Act 2004; see related discussion by Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 37-41; Baliira and Islam, *Corporate Governance*, pp. 122-200.

¹¹⁶ See paragraph 5.1 above; see related discussion in Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 37-41; Wasenden, *EU Market Abuse*, pp. 50-230.

¹¹⁷ S 99 of the Securities Act 2004; see further Wasenden, *EU Market Abuse*, pp. 50-230.

¹¹⁸ S 98 of the Securities Act 2004; see further Baliira and Islam, *Corporate Governance*, pp. 122-200.

¹¹⁹ Ss 96-99.

Zimbabwe. Furthermore, the lack of adequate surveillance systems to detect market manipulation activities has affected the investigation and prosecution of such activities in Zimbabwe.¹²⁰ This status *quo* has been exacerbated by the lack of adequate resources on the part of the SECZ to timeously detect, investigate and adjudicate upon all market manipulation violations in Zimbabwe. Moreover, the SECZ does not have adequate preventative measures in place to discourage and combat market manipulation practices in the Zimbabwean financial markets.¹²¹

7. Concluding remarks

The enactment of the Securities Act 2004 was a positive attempt on the part of the policy makers to combat market manipulation activities in the Zimbabwean financial markets.¹²² As indicated above, both trade-based market manipulation and disclosure-based market manipulation are expressly prohibited in the Securities Act 2004.¹²³ Some civil and criminal penalties for market manipulation are also provided in the Securities Act 2004.¹²⁴ Nonetheless, numerous flaws as indicated above,¹²⁵ have to date impeded the effective enforcement of the market manipulation prohibition in Zimbabwe. Owing to these flaws, the authors submit that the Securities Act 2004 must be amended to introduce provisions that expressly prohibit other types of market manipulation such as attempted market manipulation, Internet-related market manipulation and social media-related market manipulation activities in the Zimbabwean financial markets. The Securities Act 2004 must be further amended to introduce provisions for separate and distinct market manipulation criminal penalties for individuals and juristic persons. In this regard, higher criminal penalties must be imposed on juristic persons that commits market manipulation. In addition, more civil remedies and administrative sanctions for market manipulation should also be provided in the Securities Act 2004. If properly enforced, this approach could increase deterrence and enhance the combating of market manipulation in Zimbabwe.

The SECZ should be statutorily empowered to use other enforcement approaches such as whistle-blower immunity, bounty rewards and public censure to curb market manipulation practices in Zimbabwe. The SECZ must have adequate resources for it to effectively execute its functions.¹²⁶ The SECZ must have its own adequate surveillance measures to detect and prevent market manipulation activities in the Zimbabwean financial markets.¹²⁷ Lastly, the Securities Act 2004 must be amended to enact adequate provisions that define the concept of market manipulation and oblige the SECZ to be manned by persons

¹²⁰ See Chitimira, 2014, *Obiter*, pp. 254-271, for related comments.

¹²¹ *Ibid*; Salinger, *White-Collar and Corporate Crime* 30-200, for related comments.

¹²² Ss 96-99 of the Securities Act 2004.

¹²³ Ss 96 & 97; see further Chen and Shih, *China's Transitional Economy*, pp. 50-150.

¹²⁴ Ss 96-99 of the Securities Act 2004; Chen and Shih *China's Transitional Economy* 50-150.

¹²⁵ See paragraph 6 above.

¹²⁶ Chitimira, 2016, *Journal of Corporate and Commercial Law and Practice*, pp. 37-41; Stamler, Marschdorf and Possamai, *Fraud Prevention and Detection*, pp. 100-253.

¹²⁷ Ss 96-99 of the Securities Act 2004.

with the relevant expertise in financial markets law to enhance the enforcement of the market manipulation prohibition in Zimbabwe.

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